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Health And Welfare Trust Fund for Northern California, et al.

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

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28 OPERATING ENGINEERS' HEALTH AND
WELFARE TRUST FUND FOR NORTHERN
CALIFORNIA; DAN REDING and JAMES E.
MURRAY, Trustees;

PENSION TRUST FUND FOR OPERATING
ENGINEERS; DAN REDING and JAMES E.
MURRAY, Trustees;

PENSIONED OPERATING ENGINEERS'
HEALTH AND WELFARE TRUST FUND; DAN
REDING and JAMES E. MURRAY, Trustees;

OPERATING ENGINEERS AND PARTICIPATING
EMPLOYERS PRE-APPRENTICE, APPRENTICE
AND JOURNEYMAN AFFIRMATIVE ACTION
TRAINING FUND; DAN REDING and JAMES E.
MURRAY, Trustees;

OPERATING ENGINEERS LOCAL UNION NO. 3
VACATION, HOLIDAY AND SICK PAY TRUST
FUND; DAN REDING and JAMES E. MURRAY,
Trustees;

HEAVY AND HIGHWAY COMMITTEE; and

OPERATING ENGINEERS LOCAL 3 OF THE
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,

Plaintiffs,

v.
PACIFIC COAST CONSTRUCTION SERVICES,

Case No.

COMPLAINT

1 INC., a California Corporation; DAVID
 2 BURKHART, an individual, BRENT BURKHART,
 3 an individual,

Defendants.

4 Parties

5 1. The Operating Engineers' Health and Welfare Trust Fund for Northern California (which
 6 includes the Addiction Recovery Program, Inc.) ("Health Fund"); Pension Trust Fund for Operating
 7 Engineers (which includes the Pension Plan for the Pension Trust Fund for Operating Engineers, the
 8 Rehabilitation Plan, and the Operating Engineers Annuity Plan) ("Pension Plan"); Pensioned Operating
 9 Engineers' Health and Welfare Trust Fund ("Pensioned Health Fund); Operating Engineers and
 10 Participating Employers Pre-apprentice, Apprentice and Journeymen Affirmative Action Training Fund
 11 ("Affirmative Action Training Fund"); and the Operating Engineers Local Union No. 3 Vacation,
 12 Holiday and Sick Pay Trust Fund ("Vacation Fund") (collectively referred to hereinafter as the "Trust
 13 Funds"), are employee benefit plans as defined in the Employee Retirement Income Security Act of
 14 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). Dan Reding and James E. Murray are Co-Chairmen of the
 15 Joint Boards of Trustees of the Health Fund, Pension Fund, Pensioned Health Fund, and Affirmative
 16 Action Training Fund and have authority to act on behalf of all Trustees of those Funds. Dan Reding and
 17 James E. Murray are Co-Chairmen of the Joint Boards of Trustees of the Vacation Fund and have
 18 authority to act on behalf of all Trustees of the Vacation Fund. The Trust Funds and their fiduciaries are
 19 together referred to herein as "ERISA Plaintiffs" or "Plaintiffs."

20 2. The Heavy and Highway Committee is a Trust established under the Labor Management
 21 Relations Act ("LMRA"), 302(c)(9), 29 U.S.C. § 186(c)(9).

22 3. Operating Engineers Local Union No. 3 of the International Union of Operating
 23 Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor
 24 Relations Act ("NLRA"), 29 U.S.C. § 152(5), and is represented by counsel herein for the limited
 25 purpose of collecting union dues owing as part of the subject contribution claims of Plaintiffs, and not
 26 for any other cause of action. The Union expressly reserves its rights to pursue any other cause of action
 27 on its own behalf.

28 4. Pacific Coast Construction SVC, Inc., a California Corporation; David Burkhart, an

1 individual, and Brent Burkhart (“Defendants”) are employers by virtue of ERISA § 3(5), 29 U.S.C. §
 2 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2).

3 Jurisdiction

4 5. Jurisdiction exists in this Court over the claims asserted by ERISA Plaintiffs by virtue of
 5 ERISA § 502, 29 U.S.C. § 1132, in that Plaintiffs seek to enforce the provisions of ERISA and the terms
 6 of their plans, seek to enjoin the acts and practices which violate ERISA, seek equitable relief to redress
 7 such violations, and seek all other appropriate relief under ERISA.

8 6. Jurisdiction exists in this Court over all the claims by virtue of LMRA § 301, 29 U.S.C. §
 9 185, in that Plaintiffs seek to enforce the terms and conditions of a valid Bargaining Agreement.

10 7. To the extent jurisdiction over any claim does not exist under ERISA or the LMRA,
 11 supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C. § 1367 in that they
 12 arise out of a common nucleus of operative facts that form the basis of the federal claims asserted
 13 herein, each of which has a substantial ground in federal jurisdiction.

14 Venue

15 8. Venue is conferred upon this Court by ERISA § 502, 29 U.S.C. § 1132. Where an action
 16 is brought under ERISA § 502 in a district court of the United States, it may be brought at Plaintiffs’
 17 discretion, in the district where the plan is administered, where the breach took place, or where a
 18 defendant resides or may be found, and process may be served in any other district where a defendant
 19 resides or may be found. ERISA Plaintiffs’ Trust Funds are administered in this district at their principal
 20 place of business in Alameda, California. Thus, jurisdiction and venue are properly grounded with this
 21 Court.

22 9. Venue exists in this Court with respect to the claims under LMRA § 301(a), 29 U.S.C. §
 23 185, as this Court has jurisdiction over the parties, as the Union maintains its principal place of business
 24 in this district, its duly authorized officers or agents are engaged in representing employee members in
 25 this district, and the claims arise in this district.

26 Intradistrict Assignment

27 10. The basis for assignment of this action to this Court’s Oakland Division is that all of the

events and omissions giving rise to Plaintiffs' claims occurred in the County of Alameda, where ERISA Plaintiffs' Funds and the Bargained Plans are administered, and where Defendants therefore failed to fulfill their statutory and contractual obligations to Plaintiffs.

Bargaining Agreements

11. Defendant David Burkhart, on behalf of Defendant Pacific Coast Construction Services, Inc. (“PCC”) entered into the Independent Northern California Construction Agreement (the “Independent Agreement”) with the Union, which incorporates the Master Agreement (“Master Agreement”) between the Union and the Signatory Associations. Under the terms of the Independent Agreement, the principal shareholders of PCC personally guaranteed all amounts due by PCC under the terms of the Independent Agreement and Master Agreement. Plaintiffs are informed and believe that Defendants David Burkhart (who signed the Independent Agreement) and Brent Burkhart are the principal shareholders of PCC. As such, Plaintiffs allege that both Defendant David Burkhart and Defendant Brent Burkhart have personally guaranteed all amounts due herein. The Independent Agreement and Master Agreement are collectively referred to hereinafter as the “Bargaining Agreements.” The Bargaining Agreements, which incorporate the terms of the Trust Agreements establishing the Trust Funds (“Trust Agreements”), require Defendants to provide employer contributions to Plaintiffs’ Trust Funds, to the Union for union dues, and to the other plans more fully described in the Bargaining Agreements. ERISA Plaintiffs are third-party beneficiaries of the Bargaining Agreements.

12. Under the terms of the Bargaining Agreements and Trust Agreements incorporated therein, Defendants are required to pay certain contributions to the Construction Industry Force Account; Contract Administration Fund; Funding Improvement Plan; Operating Engineers Annuity Fund; Assistance & Recovery Program, Inc.; California Alliance for Jobs; Market Preservation Trust Fund; and Operating Engineers Industry Stabilization Trust Fund (together referred herein as “Bargained Plans”). Plaintiffs’ Boards of Trustees are assigned under the Bargaining Agreements to receive and administer monies due to these Bargained Plans.

13. Under the Bargaining Agreements and Trust Agreements, which are incorporated into the

Bargaining Agreements and made binding on Defendants, Defendants are required to regularly pay to ERISA Plaintiffs, the Bargained Plans, and the Union, certain sums of money, the amounts of which are determined by the hours worked by Defendants' employees. Contributions are due on the fifteenth (15th) day of the month following the month in which hours were worked, and are considered delinquent if not received by the twenty-fifth (25th) day of that month. Defendants are also required, pursuant to the Bargaining and Trust Agreements, to pay liquidated damages in the amount of ten percent (10%) for each delinquent contribution relative to those owed pursuant to the Independent and Master Agreement, but in the amount of twenty percent (20%) for each delinquent contribution which is the subject of litigation. Moreover, the Bargaining and Trust Agreements provide that interest accrues on delinquent contributions at the rates reasonably set by the Trustees from the date they become delinquent, which is the twenty-sixth (26th) day of the month in which payment was due, until paid in full.

14. The Bargaining Agreements and Trust Agreements further require Defendants to maintain time records or time cards, and to permit an authorized Trust Fund representative to examine such records of Defendants as are necessary to determine whether Defendants have made full payment of all sums owed to ERISA Plaintiffs. Should an audit of Defendants' records reveal Defendants have failed to provide full and prompt payment of all sums due to Plaintiffs, Defendants must reimburse Plaintiffs for the amounts due, including audit fees, in addition to any other obligations pursuant to the Bargaining and Trust Agreements.

Factual Allegations

15. Defendants have failed to report and pay contributions for hours worked by their employees during the month of January 2019. Defendants also reported, but failed to pay contributions due for hours worked by their employees during the months of December 2018 and February through May 2019. Liquidated damages and interest are owed to Plaintiffs for the unpaid contributions for the above-referenced months, as well as late-paid contributions for the months of August 2017 through March 2018 and June 2018 through November 2018.

16. Plaintiffs are also entitled to recover any and all other contributions, and all liquidated

1 damages and interest on delinquent contributions not specified above, found due on timecards, audit, or
 2 otherwise, including estimated contributions for any months Defendants fail to report to Plaintiffs,
 3 through the time of Judgment. Plaintiffs reserve the right to conduct an audit to determine whether there
 4 are any additional amounts due from Defendants.

5

FIRST CAUSE OF ACTION

**For Payment of Delinquent Contributions, Interest, Liquidated Damages,
 Attorneys' Fees and Costs Against Defendants**

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17. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 16, above.

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18. Defendants have a contractual duty to timely pay the required contributions to Plaintiffs
 8 and the Bargained Plans, and to timely pay dues to the Union, pursuant to the Bargaining Agreements
 9 and Trust Agreements. Defendants also have a contractual duty under the Bargaining Agreements, and
 10 Trust Agreements to permit an audit of their records to determine whether they are making full and
 11 prompt payment of all sums required to be paid by them to Plaintiffs, and to pay Plaintiffs all amounts
 12 found due as a result of an audit, including audit fees.

13

19. In addition, Defendants have a statutory duty to timely make the required payments to
 14 Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and LMRA § 301(a).

15

20. By failing to make the required payments to Plaintiffs, Defendants breached the
 16 Bargaining Agreements and Trust Agreements and is in violation of ERISA § 515, 29 U.S.C. § 1145,
 17 and LMRA § 301(a).

18

21. Defendants' failure and refusal to pay the required contributions was at all times, and still
 20 is, willful. Defendants continue to breach the Bargaining Agreements, and incorporated Trust
 21 Agreements by failing to pay all amounts owed as alleged. Said refusal is unjustified and done with
 22 knowledge and intent.

23

22. ERISA Plaintiffs are without an adequate remedy at law and will suffer continuing and
 24 irreparable injury, loss and damage unless Defendants are ordered specifically to perform all obligations
 25 required on Defendants' part to be performed under ERISA, 29 U.S.C. §§ 1101-1381, the LMRA, 29
 26 U.S.C. §§ 141-197, and the Bargaining Agreements and Trust Agreements, and are restrained from
 27 continuing to refuse to perform as required thereunder.

23. This Court is authorized to issue injunctive relief based on the traditional standard. As set forth above, ERISA Plaintiffs have a strong likelihood of success on the merits. There is the possibility that ERISA Plaintiffs' Trust Funds and their participants will suffer irreparable injuries. The balance of hardships and advancement of public interest favor ERISA Plaintiffs.

24. This Complaint does not in any manner relate to statutory withdrawal liability that may or may not be assessed against Defendant. ERISA Plaintiffs expressly reserve the right to pursue any such withdrawal liability claims against Defendants as provided by ERISA Plaintiffs' Plan Documents, Trust Agreements, and the law.

Prayer

WHEREFORE, Plaintiffs pray as follows:

1. For a judgment against Defendants as follows:

(a) Any unpaid contributions, due at time of Judgment, including those specified above as well as any other contributions determined as due by audit, timecards, or otherwise, including estimated contributions for any months Defendants fail to report to Plaintiffs, pursuant to ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A);

- i. To ERISA Plaintiffs and the Bargained Plans, in accordance with ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A) and the Bargaining Agreements;

ii. To the Union in accordance with the Bargaining Agreements.

(b) Liquidated damages on all late-paid and unpaid contributions in an amount provided for under the Bargaining Agreements and Trust Agreements, and with respect to ERISA Plaintiffs, ERISA § 502(g)(2)(c), 29 U.S.C. § 1132(g)(2)(c).

(c) Interest on all late-paid and unpaid contributions at the rates set in accordance with the Bargaining Agreements the Trust Agreements, and ERISA § 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B).

2. Plaintiffs' reasonable attorneys' fees and costs of this action, including any audit fees, in accordance with ERISA § 502(g)(2)(D) and (E), 29 U.S.C. § 1132(g)(2)(D) and (E); and in accordance with the Bargaining Agreements for all Bargained Plans; and with LMRA § 301, 29 U.S.C. § 185, for all

1 Plaintiffs.

2 3. For an order,

3 (a) requiring that Defendants comply with their obligations to Plaintiffs under the
4 terms of the Bargaining Agreements and the Trust Agreements;

5 (b) enjoining Defendants from violating the terms of those documents and of ERISA;
6 and,

7 (c) enjoining Defendants from disposing of any assets until said terms have been
8 complied with, and from continuation or operation of Defendants' business until said terms have been
9 complied with.

10 4. That the Court retain jurisdiction of this case pending compliance with its orders.

11 5. For such other and further relief as the Court may deem just and proper.

13 DATED: July 3, 2019

SALTZMAN & JOHNSON LAW CORPORATION

15 By: _____ /S/
16 Matthew P. Minser
17 Attorneys for Operating Engineers' Health And
18 Welfare Trust Fund for Northern California, et al.
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